A

DISCOURSE

Concerning

EXCOMMUNICATION,

As Executed by Officials. And concerning the Common Law Writts, *De Excommunicato capiendo*, and *De Cautione admittenda*; For the punishment of persons Excommunicated, and their Deliverance from the punishment.

Wherein is Examined, *Whether the Execution of the former* as Executed by many, be not a *profanation* of a *great Ordinance of God*; Whether by the *second* the *Subjects in many Cases* be not *unwarrantably oppressed*; As also by the *difficult granting of the other*, which is a *Common Law Writ*, and the right of every Subject to be obtained without difficulty?

Discoursed in a Letter to an *Honourable Friend*, by one who is a *Friend to the* English *Liberty*.

Wrote before the *Parliament* which Sat from *March*, 1678, to the end of *May*, 1679, and now published.

Acts. 19. 15. *Jesus I know, and Paul I know, but who are you?*
Job. 6. 25. *How forcible are right words? But what doth your arguing reprove?*

Hujus [Scilicet Papæ] *potestatem, huic cum divino munere sublatam esse manifestum est, & ne quid supereſſet, quo non plane fractam illius vim esse constaret, leges omnes, decreta, atq; instituta, quæ ab Authore Episcopo* Romano *profecta sunt, prorsus abroganda censuimus.* Epist. Hen. 8. præfixa libro cui Titulus, Reformatio Legum Eccles. impr. *Londini. Anno* 1641.

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To his highly honoured Friend, J. B. Esq;

Honoured Sir,

THE charitable design of this Paper is (amongst the many oppressed, which His Most *Sacred Majesty*, in conjunction with His two Houses of Parliament, hath made to go free,) to shew you one species of Prisoners, whom no Parliament hath had leisure as yet to take notice of; who beseech your Honours, that you would also allow them to be *Prisoners of hope*, being such as no *Act* of *Habeas Corpus* will relieve. The Adversaries of the *Non-conformists*, could not be satisfied that their Ministers were outed of their livings, and (many of them) of their whole *Subsistence* for *themselves*, *Wives and Children*, and by *another Act* forbidden to reside in any place where they might expect a relief from the Charity of good People, but many of them have been pursued to *Excommunication* upon the *Statutes* for not *coming to their Parish Church*, (though certainly they being Ministers of the Gospel, were themselves obliged to Preach on *Lords Days*,) and being *excommunicated*, they have had the old *Common Law writ*, *de excommunicato capiendo* taken out, and some of them upon it have been detained 3, 4, 7 Years; nor at the end of that Term, have their mercilesse Enemies been willing to let them out, or let them take the *advantage* of the *Law* to come out, and amongst the ordinary people, not a few have been thus used, to the ruine of many Families, the exhausting great Sums of Money most iujuriously from many persons, and the prejudicing the Trade and Commerce of the Nation; and all this by the abuse and prophanation of a great Ordinance of God, that I mean of *Excommunication*, using what was ordained of God for the *purging of his Church* from persons not fit for its holy Communion, meerly to serve their *Lusts* of *malice* and *revenge*; and to keep worthy Patriots from being chosen Members to represent their Countreys in your *Honourable Assemblies*, among many instances of which nature you had one the last *Parliament* at *Berwick* in the case of Mr *Rushworth*: and you have one yet more notorious this Parliament in *Leicestershire*: as if their

Excommunications disseised men of their *Freehold*, or (which indeed looks more likely) the Subjects subjection to their Courts brought them into the Notion of *Bond-men*. A practice which (if not timely by your Honours taken notice of, and restrained) will give the *Monoply* of *suffrages* into the hands of *Registers*, *Officials* and *Proctors*. This, Sir, certainly will give our *Honourable Senators* just cause to inquire,

1. *Whether Excommunication as now practised by Officials in Ecclesiastical Courts, be not an horrid profanation of a great Ordinance of God, and fit to be reflected on by our Governours?*

2. *Whether the imprisonment of persons Excommunicated, by vertue of the writ* de excommunicato capiendo, be *not* as practised a great *oppression of the Subject, and worthy of a Parliamentary consideration and relief?*

3. *Whether the writt* de cautione admittenda, *being the only relief provided by Law for persons so imprisoned, hath its just and free course?*

The Honour and Glory of God being the first and principal concern, as well of great Councels, as of particular persons; the first of these questions deserveth and challengeth the preference, in disquisitions of this nature.

Whatever be the *Judgment* of *some Forreign Divines*, and whatever hath been said by *Erastus*, or others to the contrary; It is manifest, *That our Church looketh upon Excommunication*, as an *Ordinance and institution of Christ*, *for the keeping of the Church pure* and *unspotted* (as the Spouse of Christ should be) and this appeareth as from other evidence, so from the very form of *Sentences* at this day usual in the *Ecclesiastical Courts*, which they usually begin *In Dei nomine*, in the Name of God, and they tell us, they proceed to such sentences, *Christi nomine prius invocato*, having first called upon the Name of Christ, *ac ipsum solum Deum præponentes*, setting God alone before them. Our Articles, 1552 tell us,

That excommunicate persons are to be avoided, as being *rightly cut off from the unity of the Church, and ought to be taken of the whole multitude of the faithful, as Heathens and Publicans:* Which Article is also verbatim in those 1562, and manifestly allude to that Text of our Saviour, *Matth.* 18. 17. generally judged to be the *Institution* of this *Ordinance under the Gospel*; Nor can any thing be clearer, then the declared Judgment of Arch-Bishop *Cranmer*, Bishop *Goodrick*, Dr. *Cox*, Dr. *Peter Martyr*, Dr. *May*, Dr. *Taylor*,

Mr.

Mr. *Lucas*, and Mr. *Goodrick*; who were the 8 Persons, (part of 32 afterward intended) who according to Three Acts of *Parliament* made in the case, were appointed by the Letters Patents of *Edward* the 6th. Dat. *Nov.* 11. in the Fifth Year of His Reign, and authorised to revise the *Canon Law*, and out of it to draw up a body of *Canon Law*, which should alone be used in *England*, who did meet and draw up such a body, (though King *Edward* lived not to confirm what they had done by His *Royal Sanction*,) as may be seen by a Book, called *Reformatio Legum Ecclesiasticarum*; printed 1670, and reprinted 1641. These great Divines tell us in their Chapter about *Excommunication*;

That it is a Power and Authority derived from God to his Church, &c. and *Chap.* 2. That the Church receiveth *these keys from Christ*.

To multiply words in this cause were vain, for none that ever owned *Excommunication*, owned it in any other notion then as an *Institution* of Christ's. And there is no pretence for any to seclude men from the enjoyment of the means of Salvation, but Christ who is the Lord of the Church. Which being granted, the true notion of excommunication is this.

It is a power granted by Christ to his Church, to remove lewd Persons, or such as are Heretical, and are pertinacious in their lewd opinions and practices from the Communion of the Church, in the holy Sacraments, and the fellowship of Christians, till they reform: Which exactly agreeth with the notion of it given us in these words by Arch-Bishop *Cranmer*, and other of our first *Reformers* in their Book called *Reformatio Legum Ecclesiasticarum*. De Excommun. *cap.* 1.

"Excommunicatio potestas est, & authoritas ad Ecclesiam a Deo
"profecta, quæ facinorosas personas, vel de religione nostra corrupte
"sentientes & ad suam improbitatem adhæ-
"rescentes, a perceptione Sacramentorum & *Reform Leg. Eccles.*
"etiam Chhristianorum fratrum usu, tantisper *Ed.* 1641. p. 159.
"summovet, donec sensus sanos recollegerint,
"& salutarium cogitationum apta signa dederint & poenas etiam ec-
"clesiasticas subierint, quibus ferocia carnis comprimitur, ut spiritus
"salvus fiat.

Excommunication being thus universally agreed, to be a *Divine Institution*, it must as to the use of it, be regulated by the Divine Rule. *None can Excommunicate, but those who are by Christ thereunto appointed. None ought to be Excommunicated, but by warrant from the*

word

word of God, and *Excommunication* must proceed with that *gravity* and *leisure*, which *the same word hath directed*. And every one seeth that where any thing of this nature is done otherwise, It is an horrible *profanation* of the *Ordinance of God*, and a *woful abuse* of a power which none but God could give unto any. That this power is given to the *Church* from Christ, is agreed on all hands: Whether it resteth in *the whole Church*, or in the *Governours of the Church*, is the onely question here.

That this power according to the institution of Christ belongs *to the whole particular Church, to whom the offender relateth*, is to me as clear as the light. According to the Primitive direction, *Matth.* 18. If he would not *hear the Church, he was to be us an heathen and a publican*. The Apostle speaks to the whole Church at *Corinth*, 1 *Cor.* 5. 4. *That in the name of the Lord Jesus, when they were gathered together and his spirit, with the power of the Lord Jesus Christ, they should deliver such a one to Satan*; and Excommunication being not only a seclusion of the party from the *enjoyment of Ordinances*, but from the *intimate Communion of the Members of the Church*; It is very absurd for *Officers* in a Church, to think of secluding any from the communion of those who will yet have fellowship and communion with them; and consonant to this was the Judgment of the Ancient Church, that none ought to be excommunicated *dissentiente plebe*, without the consent of the people, from whose communion he was to be secluded. And without doubt as to the *Major Excommunication*, it is the most rational thing imaginable, and our first *Reformers* in the aforementioned Book called *Reformatio legum Eccles.* pag. 161. cap. 6. on this subject, saith; *Totius Ecclesia consensus quamquam optabilis esset.* That the consent of the whole Church is desireable, but because it can very hardly be procured, they ordain as there followeth. *That no one person should exercise this power*, &c. but that the *Archbishop*, or *Bishop, or some other lawful Judge, with a Justice of the Peace, and the proper Minister of the place where the party accused dwelleth, or some other appointed by him, and two or three other Religious Ministers* should meet, in *whose presence after a due and full handling and weighing the cause, the party should be Excommunicated*. Some will have *Excommunication* the *Act of the whole Church* onely denounced by the *Minister*. Others will have it the *Act of the Presbytery* or *Governours of the Church*. Others who fix the Government in *Bishops*, will have it the *Act of the Bishop*; but our *Primitive Reformers*

would

would not have him doe it, but with a *Justice of the Peace*, the *Minister of the place*, and *two or three other grave Ministers, who all together, should hear, examine, and ponder the cause, and agree, the person deserving such a punishment, which they might then Decree, and the Minister of the place might Publish.*

It being an institution of *Christs*, it ought also to be denounced against none but such onely, as he hath in his word appointed it for, which is not onely determinable from the *letter of Scripture*, but from reason concluding from the *End of the Institution.* In the letter of Scripture, there is no pretence for *Excommunication* of any, but for such crimes as *shut a man* (without Repentance) *out of the kingdom of God*; those are either *damnable Heresies*, according to St. *Pauls* direction to *Titus*, Chap. 3. v. 10. *An Heretick after the first and second admonition reject*, and the example of St. *Paul*, 1 *Tim.* 1. 20. who delivered up to Satan *Hymeneus* and *Philetus*, *having made shipwrack of Faith*; Or *lewd* and *vile practices*, for which we have a president in the *incestuous person*, mentioned 1 *Cor.* 5. and conform to this hath been the constant judgment of the Church, and our aforementioned *Reformers* in the book, and place aforementioned determine, that they must be *personæ facinorosæ & de Religione nostra corrupte sentientes & ad suam improbitatem adhærescentes.* Leud persons, corrupt in their sentiments of Religion, pertinaciously adhering to them, and yet more plainly in their third Chapter, which I shall Translate:

Excommunication ought not (say they) *to be used in minute offences, but upon atrocious horrible crimes, when the Church is grievously scandalized, either because Religion is overthrown, or good manners perverted by them, of this sort are those of which St.* Paul *saith*, that those who do such things, shall not enter into the Kingdom of God, or shall not inherit the Kingdom of God, or because of those things the wrath of God cometh upon the children of disobedience. *These horrible wickednesses ought to be punished by Excommunication, so as they who are guilty of them shall be thus punished, unless they in time reform, and when they are admonished, withdraw themselves from these courses, and be willing to satisfie the Church for the dammage it hath sustained from their offences: for Excomunication is not to be used, but when men have hardned themselves in their wickednesses, which happeneth two wayes, either when being call'd to*

answer

answer for such offences, they will not appear; or if they do appear, they will not obey the admonitions of Judges.

This was the opinion of holy *Cranmer*, and *Taylor*, (two of our blessed Martyrs) and those other good and learned men, that lived in King *Edwards* dayes, in the very beginning of the Reformation, and were known to be none that could be justly called *Presbyterians* by any who understand what *Presbyterians* are. Besides, this is evident from the end of this *Appointment*, which is keeping the Church pure as the spouse of Christ. Now how can the communion of any Church be corrupted, but either by *damnable Heresie*, Superstitious or *Idolatrous worship*, or by the lewd conversation of its members? from whence what was said before follows, that none but damnable Hereticks, Idolatrous, and persons lewd in their lives, and Pertinaciously resolved to continue so, can by any right, or authority from Christ be Excommunicated.

3. Further, it being an *Institution of Christ*, it must be used, as by those persons whom he hath appointed to it, and towards those persons onely whom he hath willed should be so punished, as a means in order to their Reformation; So with *those circumstances and in that order onely which he hath prescribed*, what is that? let us look *Matth.* 18. 16, 17. we shall find it must be after *first, second, and third admonition.* St. *Paul* saith, *Titus* 3. 10. *After the first and second admonition*; Conformable to this hath been the practice of the Primitive Church, and such was the Judgment of our first Reformers, as may be seen in the book beforementioned, cap. 4. pag. 160. I will translate the whole Chapter.

No Judge shall Excommunicate any person, unless he hath admonished him once, and again, and a third time if occasion be, that if it might be he might seasonably reform his life, and there shall be a certain time allotted to the offender for him to think and conclude with himself, whether he will obey the admonition. But he that is rightly called [*that is for such crimes as Excommunication ought to proceed against*] *if he appeareth not presently, runs the danger of Excommunication.*

From the premises naturally followeth, That it is impossible that the holy name of God our Saviour should be more profaned, in the pretended use of any institution of his, Then for them to meddle with

with it, *whom he never appointed thereunto*, and for it to be applyed *to those whom he never directed the application of it unto*, and for it to *be used in a method or manner contrary to what he hath directed*. And for this Ordinance, it is an institution which he hath appointed for purging his Church from stubborn Hereticks and lewd livers, which he hath ordained his Church, and the officers of it, should discreetly, and with great gravity, leisure, and seriousness, use in order to that end. First, calling before them persons accused of such guilt, then gravely admonishing them, a first, second, third time giving them due leisure to think upon their pious and grave counsel, and to amend, and if they do not, then they are to declare them Separated from the Church in the Communion of all Ordinances, but such as Heathens may communicate in, and such with whom the members of the Church must have no intimate and unnecessary communion with them, though they may buy and sell with them, as they may with Heathens, and they ought to admonish them occasionally as they meet them, as those who have formerly been Brethren, *not counting them as Enemies*. 2 *Thes*. 3. 14, 15.

Let us now, Sir, Examine, how this *grave* and *dreadful* Sentence is made use of by *Officials*, for what end, upon what persons, and in what manner.

1. Excommunication among us is *decreed* by *Officials*, who are most of them Doctors of *Civil* and *Cannon Law*, some of them but very few ordained persons, but seldom or never by the *Bishop* or *Minister* of the place to which the concerned person belongeth; We indeed plead the necessity of Bishops for jurisdiction, of which this is the main, but in practice confess there is no such need, for persons are *cited*, *admonished*, *Excommunicated*, *laid up in Gaols*, and the *Bishop* never knows of it. For persons not in orders to *Excommunicate*, is an abomination not allowed in the *Popish Church*, and for any in orders to excommunicate persons to whom they stand neither in the Relation of *Chief Pastors* (as *Bishops* are accounted) nor curates, or *subordinate pastors*, is what is warranted by no Authority from Gods word, nor any true primitive Authority, nor the judgment, or practice of any other Reformed Church, nor the judgment of our own first Reformers: So that plainly the institution is perverted, profaned and abused, as to the Administrators of it. But let us enquire further.

2. All Excommunications proceed *upon contempt*, and ought not

 otherwise

otherwise to proceed. This contempt may be,

(1.) *When persons duly cited for such Crimes, as by the rule of Christ men ought to be censured for, do not appear.*

(2.) *When appearing, they yet refuse to obey the Ecclesiastical Judges admonition of them, to amend such courses and practices as according to the word of God they are to avoid, or if they persist in, to be cast out of the Church.* For, our Officials cause men ordinarily to be *cited* to their Courts, not only for erroneous Doctrines, or for their leud practices, such as *Drunkenness, Fornication, Adultery, Incest, Cursing, profane Swearing*, &c. but for any Crimes or Offences which they take their Courts to have jurisdiction of, which (as they make them) are almost innumerable; if they appear not as the day, they are presently Excommunicated, though it may be, they were cited for not paying a *Church-Wardens rates*; and it may be where they were unjustly taxed, or a *Proctors Bill*, which it may be is thrice what by Law it should be, or for not coming to *prove a Will*, and an Hundred such like trivial things.

If they do appear, and the Judge admonisheth them to appear next day, and they fail, or to answer a Libel, which is illegal, and they are not in Law bound to answer: Or an Hundred such like light things, they are again, if they obey not, Decreed Excommunicate; So the punishment which Christ hath appointed for the most vile and flagitious Crimes, is dayly made use of to punish the most minute and trivial Offences; expresly contrary both to Scripture, and to the Judgment of all *Reformed Churches*, and our own *Primitive Reformers*.

3. According to the *Rule of the Word of God*, the Judgment of all *Reformed Churches*, and our own *First Reformers*, Excommunication ought not to be agreed, or decreed by any single persons, nor before a first, second, and (if need be) a *third admonition*; and those so given, that the presumed guilty person, have due leisure to consider with himself what to do, and to digest his pious admonitions. But the way of our Officials is to *admonish thrice* in a Breath, saying, *I admonish you* the first time, *I admonish you* the second time, *I admonish* you the third time; *I decree you Excommunicate*, all in the Tenth part of an hour.

Now, Sir, I offer it to your serious consideration, and the Reflection of any person of *Religion* and *Sense*, whether this be not as high a profanation of an Holy Institution of our Saviours, as can reasonably

bly be imagined: Nor had it been so long endured in this *Reformed Church*, had not *King Hen. 8th. first*, then *Edw. 6th.* dyed before they had called together the 32 Persons which each of them was by Authority of Parliament, designed to call together to revise the Canons, and compile one body out of them, as may be seen by the Act 25, *Hen. 8th.* 19. and another Act in *Hen. 5th.* time, and another in the 3. *Edward 6th* There being but Eight of them called, and those by *Edw. 6th* in the Fifth year of his Reign, (as appears by his Commission, dat. 11. day of *Nov.* that year, and preferred to the book before mentioned, called *Reformatio Legum Ecclesiasticarum.*) But that Excellent Prince dyed, before that he had added his *Royal Sanction* to that new formed systeme of *Canons*: So as though we have had considerable *Reformation* in *Doctrine* and *Worship*; yet, we have had none in Discipline, but proceed according to all old *Popish Canons* and *Methods*, where they are not *contrariant* or *repugnant* to the *Kings prerogative*, or the Laws of the Land, which the Stat. restrains. 25. *Hen.* 8. 19. 14. *Car.* 2. I beseech you Sir, seriously consider, whether this practice be not apparently *a profanation of a Divine Institution*, and taking the *Holy Name of God in vain*; who hath said, *He will not hold him guiltless, that takes his Name in vain.* If it be, whether it be fit any longer to be indured in a Nation that professeth to Christ, especially considering, that by the common Execution of this sentence, in stead of purging out the rotten and putrid members of the Church, the soundest members are cut off, I mean, persons of sobereſt Principles as to Faith, and the severest Lives; and mens Lusts are served instead of Christ Our *Excommunications* being grown ordinary revenges of particular *spight and malice*, when they have a mind to get a person out of a City, or County, they know not why, or to be even with those, that would not be awed to give their *Suffrages* for such Members to serve in *Parliament* as the *Officials*, *Registers* and *Proctors* would have had. To all which is considerable, the eminent oppression and ruine of many Persons and Families consequent to this practice, which brings me to the second question propounded.

2. *Whether the Imprisonment of persons upon the Writt* de Excommunicato capiendo, *be not* (*as practised*) *a great oppression of the Subject, and a grievance worthy of a Parlimentary consideration, for Relief?*

Our *Common Law* is, That when a person hath stood Excommuni-

cated 40 dayes, the *Bishop* may send into the Chancery a Writing, *signifying* so much, (which Writing is usually made, and the Bishops Hand and Seal set to it of course without his knowledge;) upon which the party suing for it, shall have a Writt, which is called the Writt *de excommunicato capiendo*, directed to the Sheriff, commanding him to *seize and imprison the person* concerned, where he must lie *without Bail* or *Mainprize*. This may be done as to any person who hath stood Excommunicated so long, but is seldom done, but where any *Official*, or *Promoter*, or *Church-Wardens* have a *particular revenge* to execute, or where the *Registers* want Money; But these Writts within these few years, have flown abroad at a very strange rate. If the Register can take any persons, they will scrue out 5, 8, 10 pound, and set them at Liberty. Others shall lie in Prison during their pleasure, till their Families be impoverished and ruined for want of their Labour and care; and themselves have contracted some fatal disease, that either they dye there, or soon after they come out, or live a valetudinarious Life ever after. My self have known, One, a reverend Minister, kept thus 7 years, another 4 years, others a long time: One poor man I knew, dragged out of his death-bed, (so it was then like to prove, and in few days did prove,) by Bayliffs, and his Friends enforced to redeem him for five pounds paid to the *Register*, which proved but the dear purchase of a few hours life, abundance of such instances might be produced. These punishments are all inflicted by the civil Magistrate, he issueth the Writ to the *Sheriff*, whose Bailiffs by his precept seise the person, and whose Jaylour keeps them. Sir, *I have often stood amazed to think how any intelligent civil Magistrate could answer this dealing with people before God.* Admitting a person unduly *Excommunicated*, (and it is not one of ten but is so) either for a cause which the Law of God will not justifie, (and that alone can justifie the lawfulness of an *Excommunication*,) or for causes, or in manner and methods which the Law of men will not justifie, onely the ignorance of *honest simple souls*, or their want of money keeps them prisoners. I would gladly know of him that can answer me, upon whom the blood and ruine, of these persons or their wives and children must lye, and who shall account to God for it another day? For an account must be made, and the cry of the innocent shall be heard and adjudged.

In the case admitted, here is plainly an Act of high *unrighteousness*, *oppression*,

oppreſſion and *cruelty*, and what before God amounts to no leſs then *Murther* or *Robbery*. The queſtion is, who is guilty of it? It is true, the Kings Name for form ſake is uſed in thoſe Writts, but he is not concerned in the guilt, nor knoweth any thing of it. It ſhall not lye upon me, ſaith the *Curſitor*, I did iſſue out the Writt indeed, but that is the duty of my place to iſſue out any *Common-Law Writt*; Not upon me ſaith the *Sheriff*, I did but Execute the *Writt*, Nor upon me ſaith the *Bayliff*, I did but Execute the *Sheriffs precept* upon the Writt; Nor upon me ſaith the *Gaoler*, I did but keep him according to the *Sheriffs* Warrant. I do not think any one can be excuſed, who knowingly hath had an hand in the action. Neither the *Official* who decreed the Excommunication. Nor the Miniſter that publiſhed it, nor the *Officials* or *Regiſter* that ſignifyed in the cauſe; nor the *Curſitor* that iſſued out the Writt, nor the *Sheriff* that Executed it; nor the *Bayliff* or *Gaoler*. I am ſure in other cauſes at our Law, the Juſtices or other Officers illegal warrant will not juſtify the *Conſtable* or *Gaoler* for falſe *impriſonmen*. We had another Writt much of the ſame batch taken away by the laſt *Parliament*; upon which the *Sheriff burned honeſt men*, judged Hereticks by the Church-men. I would gladly underſtand who were guilty of thoſe *woiſt of murthers*. The *Sheriff* there did but Execute the Common Law Writt in the cauſe, would that excuſe him, think we? It ſeemeth my Lord *Cook* did not ſo judge, for before he would take the *Sheriffs Oath*, he got the clauſe abated, by which he ſhould have been obliged to perſecute the *Lollards*; but admit, Sir, that all theſe inferiour Miniſters of *Magiſtracy* were excuſed, becauſe they do but Execute an *unrighteous Law*: The guilt muſt then lie upon thoſe that *made* the *Law*, and *that ſuffer it ſtill to continue in force, having power in their hands to annul it*. I take it to be true in Divinity, that no *command of man* can juſtify any *Miniſter before God, in any act of impiety* or *unrighteouſneſs*, much leſs *alter the nature of the action*, and make that *pious* and *righteous*, which is *predetermined* by the Law of God *impious* or *unrighteous* to aſſert any ſuch Atheological poſition, is in plain terms to make the Creature paramount to God, and a Controuler of his Creator; but if it would, ſtill the guilt muſt lie ſomewhere.

2. But, Sir, Doth it no deſerve ſome further deliberation, whether the *Civil Magiſtrate* hath *any obligation from God upon him thus to carroborate Church-cenſures*? I do know that our Common Law Writt *de excommunicato capiendo* ſaith, — *quia querelis Eccleſiæ deeſſe*

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deesse non debemus: But I want one Text of Scripture to prove any such thing. The great ends of excommunication are

1. *Purging the communion of the Church.*
2. *The Reformation of the offender.*

The first end is obtained by *Excommunication*; if indeed an Excommunicated person will intrude into the Communion of the Church, it is a breach *of the peace*, and falleth under the Magistrates cognisance.

For the Second end, A Gaol in ordinary cases proveth a very *inadequate medium* to the Reformation of any person, and where it doth one good, it is found upon experience to do hurt to an hundred. Humane Nature is rarely tamed by such rough applications: I never yet knew any cured of their *Nonconformity* by being laid up in Prison: 'Tis such an Anti-Evangelical way of Cure, as hath not met with any success, that can farther commend it. When our Blessed Saviour instituted the purgation of his Church, He spake not a word of a Gaol; He ordained, that his *Church* should send for an Erroneous and Scandalous person, endeavour to convince the Gainsayer of his error, instructing him with all meekness, rebuking him with all gravity, by the Mouths of their grave Pastors and Teachers. That if doing this once would not produce the desired effect, they should do it a second, then a third time, waiting to see if God at any time would give him a heart to repent. If this would not do, That the Church being *in the Name of Christ gathered together*, should declare such a person cut off from the Communion of his People. This now done by persons not guilty of the like or worser Crimes, and clothed with the Authority of Christ, is a probable means to reduce the offender; however, the Church is cleared from such a person, and its Communion is kept pure; though the Person be thus cut off from Communion, yet the Church shall not count him as an Enemy, but mourn over him, pray for him, admonish him as a Brother. How came in the Writt *de Excommunicato capiendo*, as if the Ordinance of God had not sufficient Authority for its ends? For 300 years after Christ, the Church could have no such assistance, nor do we read that it complained for the want of it, possibly here and there God might make some pertinacious *Heretick* or *debauchee*, an extraordinary Example of his Vengeance. He hath done so in our Age, in the case of Mrs. *Hutchinson* in *New England*, but that God ever did. This ordinarily for the first 300 years can be proved

proved by no Scripture, no Authentick Authority; But as the Popish Government crept up by degrees, so pretended Church Officers began to enlarge their jurisdiction, and to excommunicate for slight and trivial causes without any pretence of Authority from God, but meerly to subjugate people to their Wills, and get fees for *Chancellors*, *Officials*, *Registers*, &c. They had no reason to trust God any longer to vindicate their usurped Authority, and to justifie their groundless and impious *Excommunications* and *Anathemaes*. They must therefore now call in the Civil Magistrate to do that which they could not expect that God should ever do. Now come Writts to be invented. To *imprison persons excommunicated*. To *take Apostates*. To *burn Hereticks*, &c. The Ordinance of God, was first turn'd into *Ridicule*, by dealing it out as *Solomon* saith, *Prov.*26.18. *the mad man casteth firebrands, arrows and death*, and most lewd and vitious persons imployed to dispense this grave sentence, principally to be used against lewd persons, so as every one that heard them, cryed out, *Physician heal thy self*, and all sober persons thought they heard God speaking to them; *What hast thou to do to declare my Statutes, and that thou shouldst take* my name, or my authority, or my censures *into thy mouth, seeing thou hatest instruction, and castest my words behind thee*? and then the civil Magistrate was called in to help the Church, in her male-administrations, whose work indeed was to have *whipt these buyers and sellers out of the Lords Temple*, and then the *glory of the Lord would again have appeared betwixt the Cherubims*, *Excomunication* would have appeared dreadful enough without the appendix of a Gaol. There was never any need of Gaoles to punish excommunicated persons, till persons came to be excommunicated for not paying *Sextons wages*, *Proctors fees*, *Easter two-pences*, *Tythe-piggs*, *and Geese*, not *coming to the Parish-Church*, not *signing with the Cross*, not *wearing Surplices*, not *kneeling at the Sacrament* (crimes not mentioned in the word of God) yea for *preaching the Gospel, meeting together to pray to God*, or to *hear a good Sermon*. And it is not a Gaol will convince those offenders that they do evil. *Obj.* But I hear some say, These *are all acts of disobedience to Authority*, and *disobedience is as the sin of witchcraft*. *Resp.* Disobedience to the Law of God, (of which *Samuel* speakes) is indeed as the sin of witchcraft, but yet every disobedience to the Law of God is not to be punished by *Excommunication*. It will be hard to justifie it to be the will of God, that persons should be excommunicated for every *idle word, of which*

they

they must give account, or for an 100 things forbidden by the Law of God, much less for all things forbidden by the Law of God. Nor is a Gaol the punishment set for every disobedience to the Law of man.

3. But, Sir, admit a person were duly *Excommunicated according to the Law of God* (which not one of a hundred is, not one of ten duly according to the laws of men, witness the *Judges* relieving many by Writs of *prohibition*, *habeas corpus*, *supersedeas*, &c. and many more would be so relieved, were they acquainted with the law, or had they purses to take the advantage of it;) yet I very much doubt, whether the *Civil Magistrate* with a *safe Conscience* can send *him to prison*, and so be a means of his ruine. My reason is because *he hath had no knowledg of his crime*, further than that an *Official hath told him, he hath been excommunicated 40 dayes*. I take for granted, and I appeal to your reasons, *whether any Magistrate ought not to do what he doth out of judgment and upon certain knowledge?* Our law suffereth not the Magistrate to grant an execution against any for forty shillings, till he hath been arrested, and he hath heard what he or his Council can say in his own defence; but in these cases, the Magistrate commands a person to be imprisoned and ruined, and neither doth, nor may hear any thing of his cause. It is true at our *Assizes* and *Sessions* Malefactors are condemned, to be *whipt, branded, imprisoned, hanged*; but the *Sheriff* who is to be the *Executioner of these sentences*, hath his place there, and a liberty to hear the persons case tryed, and he doth hear the case argued, so as that he is or may be convinced the person deserveth such a punishment, which done, as a Minister of God and of Justice he may proceed with a conscience not rebuking him. But in these cases, the *Civil Magistrate* hath no such liberty, but proceeding upon the credit of the *Official*, and his supposed justice and honesty.

4. I cannot discern a figleaf to cover the nakedness of this, but what is usually objected; *That this is according to Law*. The meaning of which is no more then this; That this hath been a *custom in England*, and *there is a Common law writ in this case, formed by Judges in Popish-times*, and not since corrected by *Act of Parliament*. If this plea be good, we have reason to bless God, that we were not burnt at stakes before the writ *de comburendis Hæreticis* was by the last Parliament annulled, there was then as much law for that, as for this. But is it to be wondered, that while the Nation was enslaved to the

the Pope, such things should be? A Magistrate under Popery, is but the *Popes slave* and *Executioner*. If a Magistrate would not do what the Church (as they call'd it) commanded, he was *Excommunicated*, his *Nation interdicted*, no Priests durst perform any divine Offices in that unholy ground, and no sooner is a Prince *Excommunicated by them*, but every subject is by them made a Traitor, authorised to poyson, stabb, shoot him, or to rise up in Rebellion against him, and all his neighbour Princes are armed with what authority the Pope can give them to invade him, and despoil him of his Dominions. Now that magistrates under these circumstances should have temptations, to burn, and hang, and imprison men, never knowing why, or whether they were any way guilty of any thing worthy of any such death or bonds, is no way to be admired. But that in a Protestant Countrey, where Magistrates are under no such temptations to fear, such things should be done, is matter of just admiration; and no Magistrate ought to punish persons under pretence of an usage and custome so to do, before they be satisfied, that they have deserved such a punishment.

5. But further, Sir, Admit That the practice *hath been Law*, as they call it, that is a *custom in England time out of mind*; and that *it is law*, that is, *that there is such a Writ still may be had from Cursitors*. This custom had never been continued after the Reformation, had not *King Hen.* 8. and *K. Edw.* 6. both dyed, before they had perfected what by *Act of Parliament* they were to doe, and had began to doe, as appears by the Epistle of *Hen.* 8. and the Letters Pattents of *Edw.* 6. prefixed to the book Entituled *Reformatio legum Ecclesiasticarum*. It is true (as it may appear from the 13 chap. of that Book) persons that stood Excomunicated 40 dayes, should have been *imprisoned*. But therefore none was to be Excommunicated, but a *Civil Magistrate*, as well as the Bishop, &c. was to hear his cause, and if any Judge Excomunicated any, unless for such notorious crimes as are mentioned chap. 3. and with such *deliberation* as is mentioned chap. 4. *himself* (as appears chap. 8.) was not for a *months space* to enter into Church, (unless to receive the Communion.) The Superiour was to relieve the person so injured, & to annul the Excommunication, and the Judge that so Excommunicated, was to pay all the charges, and further punished at the pleasure of the Superiour Judge.——*That* (say they) *Judges may be afraid of bringing persons into so great calamity without a most weighty cause*. And may not such a custom be rescinded by a

Statute law? have not many old Popish Customes been so abolished? Is there not reason sufficient? are not the cryes of people in all corners of the Nation against it? Is there not in the skirts of it great quantities of the blood of Innocents? Have there not within these late years been more presidents then ever before of most unrighteous Excommunications? were there ever before 100 in one place, 5 or 600 in another decreed *Excommunicated*, whose greatest crime (whatever is pretended) was their giving free Suffrages for Members to serve in Parliament?

Let Sir, I beseech you the cry of the *oppressed* come before you, for your God doth not despise it. Let the *honour of Magistracy* be valued by you, let them no longer be mere *blind Executioners* of the *lusts and malice of men*, and vindicators of the illegal and impious actions of others. There is no Sober man in these Nations, but dreadeth *Excommunication* duly administred and applyed, because of the authority of God in it. But they must then see it used onely against the enemies of God; *Drunkards*, *Unclean persons*, *Cursers*, *Swearers*, *Hereticks*, *Idolaters*, *Perjured persons*, *Blaspemers*, &c. and applyed to them by grave and holy *Bishops and Ministers*, before it, once and again, labouring to convince them of their sin from the word of God, and advising them to reform, and waiting for their Reformation, and at last with *grief and tenderness*, with gravity and *seriousness*, proceeding to so dreadful a sentence. How forcible are such right words? but what or whom have our arguings of that nature reproved? who will, who can believe, that is *bound in heaven*, which by these hands, and for these causes, and in this slighty and præcipitant manner is *bound on Earth*? But, Sir, there is yet one thing more in this case, which I must crave leave to offer to your *Deliberation*.

3 Qu. *Whether the Writ de Cautione admittenda, being almost the onely Writ for the relief of persons imprisoned, upon the Writ de Excommunicato capiendo, hath its free course yea or no?*

The tenderness of our forefathers for the liberty of the Subjects person, is obvious to every one, who hath the least knowledge of the Law of *England*. If a man be unduly imprisoned, he may relieve himself, 1. *By Action* upon *Magna Charta*, which provideth that none shall be imprisoned, but upon the judgment of *his Peers*, or *by the Law*

Law of the Land. 2. By the Writ *de Odio & Atia.* 3. By the Writ *de Homine Replegiando.* 4. By a Writ of *Habeas Corpus, Superſedeas, Prohibition. &c.* in diverſe cauſes. But becauſe by an old cuſtom, perſons impriſoned at the Churchs deſire were not *Bailable*, There was a particular Writ deviſed for their relief. For our forefathers never intended the Subjects ſhould lye at the *Officials* mercy. The old Law therefore provided, that perſons ſo impriſoned ſending to the Biſhop, and tendring him a *Caution* for their future obedience, to that command of the Eccleſiaſtical Court which they had diſobeyed, they ſhould be diſcharged, three legal *Cautions* were preſcribed. 1. *By Pledge.* 2. *By Bond* 3. *By Oath.* The Subject tendring any of theſe might be diſcharged, by the old Law of *England*, under the greateſt Popiſh Tyrrany and Uſurpation. The Law further provided a Writ (if the Biſhop refuſed the Caution) to command him to take it. I will tranſcribe it as I find it in the *Regiſter of Writs*, immediatly following the Writ *de Excommunicato capiendo*, (as they ſay the God of Nature hath in ſome Countreys planted *Antidotes* in view of poyſonous plants.v.Reg. Bren. Orig. & *Judicialium*, *Londini*, 1634.) *It* hath this *Rubrick:*

> *Si Epiſcopus idoneam cautionem de parendo mandatis Eccleſiæ ab hujuſmodi excommunicato impriſonato admittere recuſaverit, volens ipſum per priſonam gravare. Tunc mittat amicum ad Curiam & fiat ei Breve ſic.*

That is, *If the Biſhop having a mind to oppreſs the party, ſhall refuſe to accept a fit Caution, then let him ſend any friend to the Court*, and let a Writ be made to him thus. Whence I obſerve,

1. That even in thoſe times, *Officials* were for keeping Perſons in Priſon contrary to all Law and Juſtice.

2. That to remedy that Evil, this Common Law Writt was invented.

3. That it is of the ſame Authority and as much *Law*, as the Writt *de Excommunicato capiendo.*

4. That it is not a *Writt of Diſcretion*, which may be granted, or refuſed, as Officers pleaſe, and therefore to be obtained by *Petitions* or *Motions*, but a Writt of *Common Juſtice*, which ought not to be denied by *Curſitors* to any Friend of the Impriſoned Perſon, coming to the *Curſitor*, and demanding it.

5. One thing I might further add, that it is upon the point, *the only remedy provided in Law for perſons thus impriſoned.* The party

is not remediable by action, or indictment upon *Magna Charta*, because though he be not imprisoned by the *Verdict* of his *Peers*, yet he is imprisoned *per Legem terræ*, by the Custom of *England*; nor by the Writt *de Homine replegiando*, because that runs. ——*Unless the party be imprisoned for something, for which according to the custom of* England *he is not repleviable*, which is the case here; nor by the Witt *de Odio & Atia*, for it is hard to make out that such a Person is imprisoned out of *malice*, though he indeed be so: Nor by any VVritt of *Supersedeas*. Indeed by the VVritt of *Habeas Corpus*, a person thus imprisoned, may bring himself before the Judges at *Westminster*, but they shall only judge whether he be *justly Excommunicated* from the *Significavit* which is before them. If the *significavit* saith it is for *contempt of the Court*, being *legally cited* to answer for *such Crimes as are Cognoscible in that Court*, whether he were ever legally cited, or no, The Judges cannot relieve him, the parties Remedy lies against the *Official*, by *Action of the case*, and if he tryeth that way, if the *Apparitor* hath sworn in the Court, that he did duly cite him, whether he did or no; No action will lye but against the *Apparitor*, which is a lamentab'e remedy. If indeed it be contained in the *significavit* that he hath been accused for Crimes, which have been legally proved, and he admonished, and not obeyed, but suffered himself to be Excommunicated, and stood so forty dayes. And the party can make it appear, That the pretended Crimes were no Crimes, or not cognoscible in that Court, or that they were not legally proved by two VVitnesses, or that they have been pardoned, or that he offered the Bishop caution, and he hath refused, or that he did not stand Excommunicated 40 dayes, or that the VVritt of *Excommunicato capiendo*, was not legally taken out as is limited by the Stat. 5. *Eliz.* 23. Or that he hath appealed according to Law; in these cases he may be relieved by *Habeas Corpus*, or it may be a less chargeable way by *Supersedeas* (of which yet I am not certain if the VVritt be Executed) but the true legal relief of the Subject, if the Bishop refuseth Caution, I take to be by this VVrit *de cautione admittendâ*: Though it be advisable for every Excommunicated person, as soon as his Excommunication is published, to send one or two to the Bishop, and to offer a *Cautionary bond*, which by Law he ought to take; if he refuseth, it may be advisable for him, as soon as he heareth the VVritt is out against him, to move for a *supersedeas* upon that suggestion, or a Prohibition (if it will bear it;) if not, without

out more adoe, to yield himself a Prisoner, and then bring this VVritt *de Cautione admittenda*, you shall find the VVritt in the *Register of Writt*, Printed in *Lat.* 1634. p. 66. in *English thus*,

" The King to the Venerable, *&c.* On the behalf of A. whom " upon your denunciation, we have commanded by our High " Sheriff to be Imprisoned, as a person excommunicate, and " contemning the Keys of the Church, until he shall give Satis- " faction to Holy Church, as well for his contempt, as for " the injury done unto it. It hath been shewed us, that although " A. aforesaid hath often offered you a fitting Caution for his o- " beying the Legal Commands of the Church, that so he might " have the benefit of absolution; yet, you to our admiration " have hitherto refused to accept such Caution. And because " we will not have the said A. detained in Prison against Justice; " VVe Command you to accept the aforesaid Caution, and de- " liver A. from the Prison in which he is detained upon the a- " foresaid Account. Otherwise we will do what is our part to " perform.

Our wise Ancestors foresaw some Bishops might refuse Obedience to the Kings VVritt, and in that case they provided that the Prisoner should have a second VVritt directed to the High Sheriff of the County: The tenor of which in *English* is thus, as it stands upon Record in the Register of VVritts in the place aforementioned.

" The King to the High Sheriff of the County of *L.* Greet- " ing. On the part of *A.* whom we Commanded you to Imprison " according to the custom of *England*, as being Excommunica- " ted, and contemning the Authority of the Church, until he " should satisfie, *&c.* And it was shewed us, that although the " aforesaid *A.* often offered the Bishop a fitting Caution, *&c.* " yet, the said Bishop (which we wonder at) refused to accept " the said Caution, *&c.* Because we will not that the said *A.* " should longer be kept in Prison, contrary to Justice, we Com- " mand you to go in person to the Bishop aforesaid, and in our " *Name* admonish him, and effectually declare [*Our Will*] un- " to him, that taking the Caution of the aforesaid *A.* he com- " mand the aforesaid *A.* to be delivered from the prison afore- " said. And if the said *Bishop* refuse in your presence to do it, " do you Command *A.* to be delivered from the Prison afore- " said, if he be kept there on no other account.

Our

Our forefathers ordained that both theſe Writts might be had with *ſicut alias*, *& pluries*, and not reſting here ordered an *Attachment* againſt the Sheriff, in caſe he refuſed to yield obedience to the VVritt, which *Attachment* is in the *Regiſter* thus:

"The King to His Coroners in the County of *K.* Greeting, "If *W.* of *W.* Clerk, *&c.* Cauſeth you, *&c.* Then put, *&c. W.* "the High Sheriff of our County aforeſaid to give ſecurity, that "he ſhall be before us ſuch a day, to ſhew Cauſe why, whereas "we lately commanded the body of the aforeſaid *William* to be "Impriſoned according to the cuſtom of *England*; upon the Bi- "ſhop of *Ely* his denunciation of him as Excommunicate, and "contemning the Authority of the Church, until he ſhould ſatis- "fie the Holy Church, *&c.* and we hearing that although the "aforeſaid *W.* often offered the Biſhop fitting Caution, "*&c.* yet he hath refuſed to accept it; by reaſon of which "we often commanded him our High Sheriff aforeſaid, in perſon "to go to the ſaid Biſhop, *&c.* and that he ſhould command the "ſaid *A.* to be delivered, or ſignifie the cauſe to us, why he diſ- "obeyed our commands, *&c.* or to appear before us, *&c.* and "there to have our VVritt directed unto him; yet, the High She- "riff aforeſaid deſpiſing our Command to do the premiſes, or at "leaſt give us a reaſon why he would not, or could not Execute "the ſame, or appear before us the day aforeſaid; and regarded "not to make return of our VVritt as we hear, to the manifeſt "contempt both of us, and our Commands aforeſaid, and the "no ſmall dammage and oppreſſion of the ſaid *W.* And we com- "mand you, that you taking a fitting caution of the ſaid *W.* for his "obeying the Commands of the Church according to Law, and de- "liver him from the Priſon aforeſaid, if he be there detained upon "that and no other account.

This, Sir, is the known Law of *England*, in the caſe of perſons ſo impriſoned; nor is it poſſible, any *Engliſh Liberty* ſhould be more fortified.

But, Sir, My Lord *Chancellor Hide* (to whom we are beholden for more of this nature then this) by what Authority I cannot tell, turned this VVritt of *Common Juſtice* to be granted readily, and of courſe into a *Writt of Diſcretion*, making an Order, *That it ſhould not be granted, but upon a Petition firſt offered for as to him, or the Succeſſive Lord* Chancellors, or *Lord Keepers*; which Petition he took a liberty to grant, or not to grant as he pleaſed: (VVe

were

were beholden to him that he did not put the like reſtraint upon all other VVritts of Common Juſtice, for he might have done it by the like Authority.) Hence this Writt is not gained but with *great charge and difficulty*. I mean the firſt VVritt to the Biſhop: With what Juſtice this is done, Sir, I leave to you to determine.

When it is granted, ſome Biſhops have taken themſelves to be at liberty, whether to Obey it or no. Some have utterly refuſed it, with the expreſſion of great anger, and threatning Perſons that they ſhould ſeek to come out of Priſon *that way*, [*that is, by an eſtabliſhed Common Law Writt.*] Yet, all that theſe men have to ſay againſt the *Non-conformiſts*, is their *not obeying the Law*, and what Law can be plainer then this, or more ſtrong and juſt?

When the Biſhop hath thus refuſed, (which hath been often,) I beſeech you, Sir, inquire what ſucceſs they have had, who have moved for the *Second Writt* to the *High Sheriff*. It hath been often moved for; I beſeech you Sir inquire what the reaſon is, that all His *Majeſties Subjects* cannot obtain theſe *Writts of Common Juſtice* from *Curſitors*. Why the VVritt *de Excom. capiendo* flies about ſo freely, and the VVritt *de Cautione admittendâ* is got ſo difficultly, when the latter is as good Law, and as much the demanders right, as the former; and the latter is *for the Liberty* of the *Subjects perſon*, (which all the Law of *England* highly favours) and the former is for the reſtraint of it. If Sir, (till a *Statute* can be obtained to procure good mens Liberty from an old Popiſh VVritt,) the Law muſt have its courſe on that hand: I pray let it have its courſe on the other hand alſo; and let us not have the Liberty of our perſons at the mercy of every Regiſter that wants Money.

Sir, I would not be miſtaken, *I* very well know, that in ſuch Chancellours Court, in the Court of the *Arches and Delegates*, &c. many great and weighty cauſes of great and momentous natures are heard, and they at preſent have no engine, no method of Law, but by way of *Excomunication*, preſcribed to force the appearance of perſons to anſwer charges, or to force an obedience to their decrees. *I* have nothing to doe to direct my Soveraign, or a Parliament by what Courts or Judges, ſuch or ſuch cauſes ſhall be tryed, be they by whom his Majeſty and his Parliament pleaſe; nor is it reaſonable that they ſhould be without a Coercive power, both for appearance at their commands, and obedience to their Decrees; Your *Honourable Aſſembly* knows how to reach them out a ſword fit for their uſe, though they

they take not this which God hath laid up as *Sacred* in his *Sanctuary*, In our *Common-Law*, there is *Judgment by default*; in our little *Courts*, there are *Amerciaments*; In the High *Court of Chauncery*, there is an Attachment, and then *a Writ of Rebellion*. May it please you, Sir, to put any of these swords into their hands. But oh forbear this *edged toole*, which wounds both soul and body, and is not to be used but by them, to whom, and against them, whom, and in the manner wherein our *Common Lord* hath said *smite*, and *what you bind on Earth shall be bound in Heaven*. I beg your pardon for so long a letter, I should truly judge it tedious, were it not upon an unusual subject, and where the matter led me to it, and did I not know your great zeal for the *Glory of God*, the Subjects just *Liberty*, and your compassion for many persons, and families, already undone, and every day undoing, if your *Honourable Assembly* cometh not seasonably in to their rescue. Humbly committing them, Sir, together with your *Honourable Assembly* to the God of all Order, and Government, and the fountain of all wisdom, I take my leave, and rest, Sir, &c.

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